Nos. 17, 86, 87 and 88

Brief of Guthrie, Dale, &

OLEOMARGARINE CASES.

Supreme Court of the United State

of Veeder for C. J.

OCTOBER TERM, 1897.

Nos. 17, 86, 87, 88.

Filed Mar 2, 1898.

CLARENCE E. COLLINS,
Plaintiff in error,
vs.
THE STATE OF NEW HAMPSHIRE.
Error to the Supreme Court of the State of New Hampshire.
No. 17.

GEORGE SCHOLLENBERGER,
Plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA.
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BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF CONTENTION THAT THE OLEOMARGARINE ACTS OF NEW HAMPSHIRE AND PENNSYLVANIA ARE UNCONSTITUTIONAL IN SO FAR AS THEY AFFECT INTERSTATE COMMERCE.

WILLIAM D. GUTHRIE,
RICHARD C. DALE,
HENRY R. EDMUNDS,
ALBERT H. VEEDER,
Of counsel for plaintiffs in error.

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STATEMENT OF FACTS AND ERRORS ASSIGNED.

The questions in these cases arise under the commerce clause of the Constitution of the United States, and involve the constitutionality of certain provisions contained in the so-called oleomargarine acts of New Hampshire and Pennsylvania.

In the first case, *Collins* v. *New Hampshire* (No. 17), the statute of New Hampshire (Public Stats., 1891, *c.* 127, *s.* 19) provided, among other things, that it should be unlawful and criminal—

"to sell, offer for sale, or keep in possession with intent to sell, in this state, any substance or compound made wholly or in part of fats, oils, or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes, or other packages, each of which has upon it, to indicate the character of its contents, the words 'Adulterated Butter,' 'Oleomargarine,' or 'Imitation Cheese' as the case may be, in plain Roman letters not less than one half inch in length, and so placed and made or attached that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; *and if it is a substitute for butter, unless it is of a pink color.* When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters."

In order to render oleomargarine pink, it must be artificially colored.

The plaintiff in error, Collins, complied with all the provisions of this act except that the oleomargarine sold by him was not artificially colored pink. The facts found upon the trial of the case were that Collins, at the time of the alleged offense, was the agent at Manchester, New Hampshire, of Swift & Company, a corporation having its principal place of business in Chicago, Illinois, and there engaged in the manufacture and sale of oleomargarine (record, pp. 4, 7); that as such agent he sold in Manchester, at wholesale, at the store of said Swift & Company, a package weighing ten pounds, in the form in which it was packed in Chicago by his principal, containing the oleomargarine of

commerce as the same is known and dealt in as an article of food, and in the form of package and with the labels required by the act of Congress of August 2, 1886, c. 840, 24 Stat., 209, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." In addition to the express finding that the plaintiff in error had complied with all the provisions of the New Hampshire statute as indicating the true character of the article sold, etc., except only that the contents had not been colored pink, it was further found that Swift & Company had paid the special United States tax imposed by the act of Congress, and had complied with all the requirements of that act in respect of the manufacture and sale at wholesale of oleomargarine, the character and weight of packages used in interstate commerce and their labeling or stamping in order to prevent deception.

The plaintiff in error claimed that, upon these facts, he was not liable to punishment, because the statute of New Hampshire was in contravention of the Constitution of the United States and its amendments and of the laws of Congress, and excepted to the adverse ruling of the trial court thereon. A verdict of guilty was returned, and the questions of law arising on the indictment were reserved for the determination of the court *in banc*, where the exceptions were overruled and a fine of one hundred dollars and costs was imposed (record, p. 5). The opinion of the Supreme Court of New Hampshire, per DOE, C. J., is as follows (p. 7):

"The need of a uniform operation of Federal law in all the

States and the apparent degree of uncertainty as to the view the federal court may take of this statute are reasons for a disposition of the case that will furnish an opportunity to carry the Federal question to the only tribunal by which that question can be settled." (Record, pp. 5, 7.)

A writ of error was thereupon allowed and the bond on writ of error duly given, and the case is thus brought to this Court (p. 1).

In the cases of *Schollenberger* v. *Pennsylvania* and *Paul* v. *Pennsylvania* (Nos. 86, 87 and 88), the Pennsylvania statute of 1885 was held to apply not only to the local manufacture and sale of oleomargarine, but also to prohibit the sale or offering for sale or the possession of oleomargarine with intent to sell the same as an article of food, although manufactured in another state and sold by the importer or agent of the non-resident manufacturer in the original package, the package being unbroken and plainly labeled "Oleomargarine" and no deception or fraud of any kind being practised.

The Pennsylvania act of May 21, 1885 (L. 1885, p. 22), provides as follows:

"That no person, firm, or corporate body, shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food."

Violations of this act are made misdemeanors, punishable by fine and imprisonment.

It appeared in all of the Pennsylvania cases, that the plaintiffs in error were indicted and convicted of the crime of selling oleomargarine in the original package

shipped from Rhode Island or Illinois. There was no proof of fraud or imitation of any kind, by coloration or otherwise; the fact that the article was genuine oleomargarine and not butter was made known to each purchaser; and there was no attempt or purpose to sell the article as butter, nor any understanding on the part of the purchaser that he was buying anything but oleomargarine (Schollenberger record, pp. 12–14; G. E. Paul record, pp. 11–13; and J. O. Paul record, pp. 12–14).

Schollenberger was the agent of the Oakdale Manufacturing Company, of Providence, Rhode Island, and as such agent was engaged in business in the city of Philadelphia as a wholesale dealer in oleomargarine, and had paid the United States Internal Revenue tax on such business under the act of Congress. He was not engaged in any other business. On October 2, 1893, the Oakdale Manufacturing Company packed and shipped to him from Providence a tub of oleomargarine containing forty pounds. The evidence showed that the tub was of such form, size and weight as is ordinarily used by producers and shippers in the customary course of actual commerce as regulated by the act of Congress. Schollenberger sold the oleomargarine in the original package with the seals, marks, stamps and brands unbroken, as packed by the manufacturers in Rhode Island and thence transported to Philadelphia and delivered to him by the carrier, and the package was not broken or opened on his premises, and as soon as sold was removed from the premises by the purchaser.

In the *Paul* cases (Nos. 87 and 88) the facts were the same, except that the original packages contained

ten pounds of oleomargarine, and that the Pauls were acting as agents of Messrs. Braun & Fitts, who are manufacturers and shippers at Chicago, Illinois (G. E. Paul record, p. 12; J. O. Paul record, p. 12).

The Supreme Court of Pennsylvania held the act of 1885 to apply even if the oleomargarine in question was an article of interstate commerce, and said "our statute is directed especially against the sale of oleomargarine as an article of food." The court expressly declined to consider whether oleomargarine was a lawful article of commerce, holding that to be a legislative question. As stated in the opinion in the *J. O. Paul* case (No. 88, p. 21): "Whether the trade in oleomargarine is injurious and should be restricted is a question that has been decided for us. It has been declared injurious." It seemed to be the theory of the court below that the legislature could destroy the traffic in any article of interstate commerce by a simple declaration that it is injurious. The decisions of the Supreme Court of Pennsylvania will be found in the Schollenberger record (No. 86), at p. 18; also, 170 Pa. St., 296; in the G. E. Paul record (No. 87), at p. 16; also, 170 Pa. St., 296; and in the J. O. Paul record (No. 88), at p. 17; also, 170 Pa. St., 284.

The Pennsylvania statute involved in cases Nos. 86, 87 and 88 was before this Court in *Powell* v. *Pennsylvania* 127 U. S., 678, decided at the October Term, 1887, and was upheld as a legitimate exercise of police power with respect to local manufacture and internal commerce. No point was then involved or presented to the Court as to the effect of the act upon interstate commerce or upon sales in original packages of commerce. The

decision related solely to the police power as to local trade within the state, and the provision of the federal constitution granting exclusive power to Congress to regulate commerce among the states was not invoked. The case turned on the bearing of the fourteenth amendment and its provision requiring due process of law. It is plain that although a statute with reference to local traffic and trade passed under the police power of a state might not conflict with the fourteenth amendment, yet that the same statute in so far as it attempted to regulate interstate commerce might conflict with the commerce clause. The point in the one case is entirely distinct from that involved in the other.

The latest oleomargarine case before the Court was *Plumley* v. *Massachusetts*, 155 U. S., 461, decided at the October Term, 1894. This, unlike the *Powell* case, arose under the commerce clause of the federal constitution. The statute of Massachusetts prohibited the sale of oleomargarine artificially colored so as to cause it to look like yellow butter; but it was expressly provided "That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." In upholding the act as a proper exercise of the police power, Mr. Justice HARLAN emphasized the fact that the statute of Massachusetts did not prohibit the sale of all oleomargarine, but only such as had been artificially colored in imitation of yellow butter, and that, if free from coloration or ingredient that caused it to look like butter,

the right to sell it without fraud or deception was neither restricted nor prohibited. To quote the language of the opinion (p. 468):

"If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character."

A very clear and succinct statement of the scope and effect of the decision in the *Plumley* case will be found in *Ex parte Scott*, 66 Fed. Rep., 45, 49:

"I will append here a notice of the recent decision of the United States supreme court in the case of *Plumley* v. *Com.*, 15 Sup. Ct., 154. In that case the court had under review a statute of Massachusetts prohibiting the sale in that state of oleomargarine if it was got up 'in imitation of yellow butter,' but allowing it to be sold 'in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.' The supreme court held that, though the act would have been invalid if it had prohibited the sale of oleomargarine generally in undisguised form, yet that so far as it prohibited the coloring of oleomargarine yellow, so as to imitate butter, and thereby deceive the consumer, the law was pro tanto valid. Even in restricting its decision to the mere yellowing of oleomargarine, the court was held by three of the justices to have gone too far. The court were unanimous as to the invalidity of any state law which should inhibit the sale within its borders of oleomargarine, when prepared, labeled, and sold as such, without deceit or fraud."

The Pennsylvania statute denies to the plaintiffs in error the right to sell oleomargarine as such in its natural state without fraud or deception and with full disclosure, and declares them criminals and imposes upon them the penalties of infamous crimes for attempting to trade in a wholesome and nutritious article of food everywhere recognized as a legitimate article of commerce.

The power of the states to regulate the sale of oleomargarine, to prevent artificial coloring calculated to deceive, to require labels, to punish deception, etc., is not challenged. The question in the Pennsylvania cases is whether the states, in the exercise of their police power, can entirely exclude, prohibit and destroy all commerce between the states in any article designed to take the place of butter or cheese as an article of food. This necessarily involves the broader question as to whether the police power can uphold state legislation which prevents and destroys interstate commerce in any article designed and fit to take the place of any other article of foods and sold for what it is, without fraud or deception or imitation, and with full disclosure to the purchaser.

Assignment of Errors.

The assignments of error are substantially the same in each case (Collins record, p. 10; Schollenberger record, pp. 19, 20; G. E. Paul record, pp. 18, 19; J. O. Paul record, pp. 23, 24); and, although made full and elaborate with reference to the decisions of the state courts and designed to cover every point involved, the questions at issue may, in view of the ruling in the *Powell* case, all be considered under the one vital and controlling proposition that the acts of New Hampshire and Pennsylvania unconstitutionally interfere with interstate trade and traffic and encroach upon the exclusive power of Congress to regulate commerce. The questions raised by the numerous assignments of error, and all the questions that

may arise in the progress of the discussion are subsidiary to and necessarily involved in the determination of this single proposition. Its maintenance must result in the invalidity of the statutes of New Hampshire and Pennsylvania now before the Court in so far as they seek to regulate and prohibit commerce among the states.

Subsequent to the judgment and sentence in the *Collins* case and the writ of error to the New Hampshire Court, the statute under which the conviction was had was repealed, undoubtedly because too severe in its operation, and the Massachusetts statute was substituted in its place. In New Hampshire the rule of the common law has been changed, and the repeal of a penal statute does not operate as a remission of penalties or a release from prosecution or enforcement of a judgment.

The New Hampshire statutes provide (P. S. N. H. 1891, c. 2, sec. 36, p. 51):

"No suit or prosecution, pending at the time of the repeal of an act, for any offense committed or for the recovery of a penalty or forfeiture incurred under the act so repealed, shall be affected by such repeal."

See, also,

United States v. *Reisinger*, 128 U. S., 398, 401;
State v. *Kansas City*, &c., 32 Fed. Rep., 722, 725;
Railway v. *Twombly*, 100 U. S., 78, 91.

ARGUMENT.

(I.) The exclusive jurisdiction and control of Congress over the subject matter of commerce among the several states.

(II.) Oleomargarine is a recognized article of commerce, and as such the states have no power to prohibit or arbitrarily restrict trade therein.

(III.) The police power of the states in respect of local and interstate commerce.

(IV.) The prohibition of the Pennsylvania statute is an unconstitutional interference with interstate commerce.

(V.) The requirement of the New Hampshire statute is likewise an unconstitutional interference with interstate commerce.

I.

THE EXCLUSIVE JURISDICTION AND CONTROL OF CONGRESS OVER THE SUBJECT MATTER OF COMMERCE AMONG THE STATES.

It may be appropriate to refer to some of the leading decisions of the Court as to the scope and operation of the commerce clause. The Court is perfectly familiar with the whole subject in its general aspects, for questions arising under this clause are being constantly presented for adjudication; but, even if superfluous, the argument may seem more complete and the sequence more logical if some of the fundamental principles are recalled at the outset. The difficulty of the subject does not spring from any uncertainty as to these principles, but from their proper application to the individual case presented. The problem in each case is to determine whether the particular legislation of a state does, as matter of fact, encroach upon the exclusive power of Congress to regulate commerce and interfere with freedom of trade among the states.

In referring to the exclusive power to regulate commerce among the several states vested in Congress by Article 1, Section 8, of the Constitution of the United

States, Mr. Justice CATRON said in the *License Cases*, 5 How., 504, 599:

"The power given to Congress is unrestricted, and broad as the subjects to which it relates; it extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the States."

And Mr. Justice STRONG said in *Railroad Co.* v. *Husen*, 95 U. S., 465, 469:

"Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is inter-state than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive."

Mr. Chief Justice FULLER recapitulates the whole doctrine in one paragraph of the opinion *In re Rahrer*, 140 U. S., 545, 555:

"The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States. *Robbins* v. *Shelby Taxing District*, 120 U. S., 489. And if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons* v. *Ogden*, 9 Wheat., 1, 210. That which is not supreme must yield to that which is supreme. *Brown* v. *Maryland*, 12 Wheat., 419, 448."

In *Scott* v. *Donald*, 165 U. S., 58, 91, the South Carolina dispensary law was held invalid upon the ground, as stated in the headnote, that the act "recog-

nizes liquors and wines as commodities which may be lawfully made, bought and sold, and which must therefore be deemed to be the subject of foreign and interstate commerce, and is an obstruction to and interference with that commerce, and must, as to those of its provisions which affect the plaintiffs, stand condemned." Mr. Justice SHIRAS reviewed all the leading cases, and said:

"So long, however, as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.[1]

"We cheerfully concede that the law in question was passed in the *bona fide* exercise of the police power. * * But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith, and to protect the people of the State from the evils of unrestricted importation, manufacture and sale of ardent spirits, cannot control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States."

It is not enough that an article which is the subject of interstate commerce should be allowed to enter the interior of a state. The non-interference by a state with the sale of such an article at wholesale or retail is as necessary to free intercourse in trade between residents of different states as is the right to cross the state boundary; and a denial of the right of sale is as much an interference with interstate commerce as if transportation itself be stopped at the state line. In the leading case of *Brown* v. *Maryland*, 12 Wheat., 419, 446, Mr. Chief Justice MARSHALL, discussing in a tax case the extent of

[1] See also *Vandercook* v. *Vance*, 80 Fed. Rep., 786.

the power of Congress to regulate interstate commerce, said:

"The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior. * * If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. *It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported?* Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

In *Brown* v. *Houston*, 114 U. S., 622, 630, Mr. Justice BRADLEY said:

"According to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. * * So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom."

See also, *Henderson* v. *Mayor*, 92 U. S., 259, 268;
People v. *Compagnie*, 107 U. S., 59, 63;
Bowman v. *Railway Co.*, 125 U. S., 465, 490;
Leisy v. *Hardin*, 135 U. S., 100, 119;

Minnesota v. *Barber*, 136 U. S., 313, 320;
Brimmer v. *Rebman*, 138 U. S., 78, 83;
Voight v. *Wright*, 141 U. S., 62, 66.[1]

The traffic and trade in oleomargarine are clearly such as not only admit of but require one uniform system or plan of regulation, for it is manufactured in only a few of the states, while the demand and market for it exist everywhere. It is indisputably a commercial commodity. There can be no freedom of trade in any article of commerce if one or more states can wholly exclude it, while other states admit it freely or under regulations aimed only at deception. No reasonable degree of freedom of commerce can exist if one state can prohibit and another compel artificial coloring of any particular commodity. "The oppressed and degraded state of commerce" will be restored, and "commercial anarchy and confusion" must result, if one or more states can wholly prohibit trade in a wholesome article of food sold without fraud, upon the pretense that it is acting under its police power.

The provisions of the Act of Congress of August 2, 1886, constitute a complete system for the regulation of the interstate traffic and trade in oleomargarine, for the exclusion of deleterious ingredients, and for the prevention of fraud. The object of the act as expressed in its title was not merely to tax, but to regulate, viz. (24 Stat., 505):

"An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

This act of Congress was said in the *Plumley* case

[1] *In re Beine*, 42 Fed. Rep., 545; *In re Gooch*, 44 *Ibid*, 276; *In re McAllister*, 51 *Ibid*, 282; *In re Sanders*, 52 *Ibid*, 802; *In re Ware*, 53 *Ibid*, 783; *In re Minor*, 69 *Ibid*, 233; *State of Iowa* v. *McGregor*, 76 *Ibid*, 956; *In re Leboit*, 77 *Ibid*, 587; *In re Thomas*, 82 *Ibid*, 304; *Sawrie* v. *State of Tennessee*, 82 *Ibid*, 615.

not to have been intended as an interference with the power of the states to prevent deception or fraud or to give authority to disregard any regulation which a state might lawfully prescribe; but regulation, of course, does not involve prohibition (*Railroad Commission Cases*, 116 U. S., 307, 331).

The act imposes a tax of $600 upon manufacturers, of $480 upon wholesale dealers, of $48 upon retail dealers, and of two cents per pound upon all sales of oleomargarine; and under this law the federal government annually derives a very large revenue.[1] Have the states power to prohibit interstate commerce in what the federal government has licensed? Can the state by this method of prohibition deprive the federal government of a source of revenue and a tax imposed and collected upon a legitimate article of commerce? If so, for example, the immense internal revenue from tobacco might be swept away upon the plea that cigarettes were injurious to health and that such "a statute was aimed at the suppression of an evil of most pronounced character."[2]

Sections 6 and 14 of the act provide:

"That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or in other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail dealers in oleomargarine must sell only

[1] The official reports of the Secretary of the Treasury show: Tax receipts from the manufacture and sale of oleomargarine in the United States under act of Congress of August 2, 1886, in 1887, $723,948.04 (Rep., 1887, p. 368); in 1888, $864,139.88 (Rep., 1888, p. 348); in 1889, $894,247.91 (Rep., 1891, p. 456); in 1890, $786,291.72 (Rep., 1890, p. 352); in 1891, $1,077,924.14 (Rep., 1891, p. 456); in 1892, $1,266,326 (Rep., 1892, p. 451); in 1893, $1,670,643.50 (Rep., 1893, p. 639); in 1894, $1,723,479.90 (Rep., 1894, p. 702); in 1895, $1,409,211.18 (Rep., 1895, p. 476); total amount during nine years, $10,416,212.27.

[2] *Sawrie* v. *State of Tennessee*, 82 Fed. Rep., 615, 623.

from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. * *

"The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises."

Other sections carefully provide for the enforcement of the provisions of the act, and furnish a complete system for protecting the public in wholesale and retail dealings against fraud and deception, as well as against "ingredients deleterious to the public health." There can be no fraud and no deception in any form if the act of Congress be complied with. In each of the cases at bar, it was established that all the requirements of the act of Congress had been complied with, and this reasonably implies the finding that the oleomargarine did not contain "ingredients deleterious to the public health" in the absence of all proof to the contrary.

II.

OLEOMARGARINE IS A RECOGNIZED ARTICLE OF COMMERCE, AND AS SUCH THE STATES HAVE NO POWER TO PROHIBIT OR ARBITRARILY RESTRICT TRADE THEREIN.

The ground upon which a state may in a proper case, under the police power, regulate or restrict sales of commodities without unlawfully interfering with interstate

commerce is nowhere more clearly stated than by Mr. Justice CATRON in the *License Cases*, 5 How., 504, 600, where he said:

"If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States."

And by Mr. Justice BRADLEY in *Crutcher* v. *Kentucky*, 141 U. S., 47, 61:

"It is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress."

In *Bowman* v. *Chicago, &c., Railway Co.*, 125 U. S., 465, 501, Mr. Justice FIELD said:

"What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State."

As the states cannot regulate commerce, for the reason that such regulation is within the exclusive jurisdiction of Congress, it must follow that they cannot usurp this federal jurisdiction by merely declaring an article of commerce not to be a commercial commodity because the local or provincial policy of the state or the interests of a majority of the voters might be subserved thereby (*Leisy* v. *Hardin* 135 U. S., 100, 123, 125; *Sawrie* v. *State of Tennessee*, 82 Fed. Rep., 615, 622).

Oleomargarine has been a constant source of litigation, and innumerable cases concerning it have been before the

courts; but in no case has it ever been established that as an article of food, if properly manufactured, it was deleterious or injurious to health. The only ground assigned in support of the decisions sustaining the various stringent enactments seeking to fetter the trade, has been deception in fraudulently selling oleomargarine for butter, and the only evil complained of or aimed at was successful competition with butter.

The fact that oleomargarine, as recognized and taxed by the act of Congress, is a legitimate article of food in general use, must be deemed conclusively established; certainly so in the absence of proof to the contrary. And it is not doubted that the Court will take judicial notice of the fact, as a matter of common and scientific knowledge, that oleomargarine is not injurious to health (*Brown* v. *Piper*, 91 U. S., 37, 42; *King* v. *Gallun*, 109 U. S., 99, 102; *Phillips* v. *Detroit*, 111 U. S., 604, 606).[1]

In none of the cases at bar was any attempt made to prove that the oleomargarine sold by the plaintiffs in error was in the slightest degree deleterious or injurious to health. In *Powell* v. *Pennsylvania*, 127 U. S., 678, 681, decided in the year following the Congressional enactment of August 2, 1886, the accused offered to prove, by a scientist who saw the article manufactured, the wholesome character of oleomargarine, but the evidence was rejected as immaterial. In *Plumley* v. *Massachusetts*, 155 U. S., 461, 465, the accused offered to prove that oleomargarine was a "wholesome, nutritious, palatable article of food." This was held immaterial, and rightly so held, for the fact that it was a proper and legiti-

[1] Encyclopædia Britannica, vol. IV, p. 592.

mate article of food was already conclusively evinced by the act of Congress aforementioned, and also by the statute of Massachusetts which permitted the fullest traffic in it, "if free from coloration or ingredient that causes it to look like butter," coupled with the requirement that its sale should be "in a separate and distinct form, and in such manner as will advise the consumer of its real character." In the Pennsylvania cases at bar, the state could not and did not dispute the wholesome character of oleomargarine properly manufactured.

Mr. Chief Justice FULLER said in the *Plumley* case, 155 U. S., 461, 480:

"It cannot be denied that oleomargarine is a recognized article of commerce, and moreover, it is regulated as such, for revenue purposes, by the act of Congress of August 2, 1886, C. 840, 24 Stat., 209; *United States* v. *Eaton*, 144 U. S., 677."

In *Ex parte Scott*, 66 Fed. Rep., 45, 48, decided shortly after the decision in the *Plumley* case, Hughes, D. J., said:

"It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe, as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. Its chemical properties and preparation are such that it is adopted for the use of armies and navies of the great nations as more desirable and safe than to run the risk of rancid butters and animated cheeses. It is entering rapidly into domestic use, and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. Its manufacture and sale have been made the subject of careful regulation by Congress, and the national revenue derived from it is considerable. Manufacturers pay a tax of $600 per annum; whole-

sale dealers, $480; and retail dealers, $48. These petitioners had paid these taxes to the United States, which were heavy, and were doing business under the imprimatur of the national government; and it was for doing that business that they were arrested, tried, and jailed in this city of Norfolk. State legislation against it is therefore regarded as invidious by the national authorities, and the right of dealing in it will not be allowed by them to be capriciously overthrown."

In Tiedeman's Limitation of Police Power (p. 296) the author says:

"Although there has been some attempt made to show that this butter substitute is unwholesome as food, it seems now to be established by the most thorough chemical analyses, that there is no unwholesome ingredient in unadulterated oleomargarine."

In the "Report of the Commissioner of Internal Revenue for 1893" (pp. 171, 179, 180) the following will be found:

"This product has become a recognized article of food, and its manufacture one of the established industries of the country. There is in nearly all the states an increasing demand for it under its proper name, and by persons fully informed as to the nature of the substance. While it is used as a substitute for butter, for which it is intended, and comes into competition with the lower grades of that article, its production and sale have not, as shown by commercial reports and statistics, reduced the price of the higher grades of butter. The most reliable writers in this country on food products, and those who have given the subject careful study, state that oleomargarine, carefully and properly prepared, is a healthful article of diet and a wholesome substitute for butter, and can be furnished at less cost. * * The demand for it as a food product has become so universal that, in my opinion, opportunity should be offered for its legitimate sale in any community where it is wanted by consumers."[1]

In Vol. 134 of the "Journal of the Franklin Institute" (pp. 190–219) Prof. Caldwell, of Cornell University, voices the same sentiment:

"Under such restrictions it seems to me that the trade in this

[1] *Heath* v. *Wallace*, 138 U. S., 573, 584; *Kimmish* v. *Ball*, 129 U. S., 217, 220.

article might safely be left to itself, and that it might be a blessing to the community as a whole, in supplying at low prices a savory substitute for butter, far better in quality than most of that which the poorer classes have to eat, if they can get only genuine butter; and for those who can afford to pay for good butter, the opportunity to get it will be better, for dairymen will be obliged to make good butter if they make it at all."

Commercial intercourse and trade in oleomargarine as an article of commerce are not only recognized by Congress, but they are expressly sanctioned by the legislation of most of the states. It would be an extraordinary contention that oleomargarine is not, at the present time, a legitimate and recognized article of commerce, when nearly every state of the union now regulates and permits its sale. The regulations in many instances are unreasonably and needlessly severe; yet the fundamental fact remains that almost every state recognizes oleomargarine as a commercial and wholesome commodity and expressly permits its sale as such. For example, the Court will recall the provision of the Massachusetts Act:

"*Provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter."

This was clearly a recognition of the fact that oleomargarine is a commercial commodity. And when it is found that this proviso appears almost word for word in the legislation of seventeen other states and that in the legislation of twenty-one states, where this provision is not found, sales are permitted under regulations against deception, the conclusion would seem to follow, as of course, that the article has a legitimate commercial character, and that a state can

not, by the mere declaration of its will, take away that character and ordain that it shall no longer be an article commerce.[1]

To slightly paraphrase the language of Mr. Justice SHIRAS in *Scott* v. *Donald*, 165 U. S., 58, 91:

"So long, however, as state legislation continues to recognize [packages of oleomargarine] as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

The Supreme Court of Pennsylvania and some other courts have assumed that the right to invoke the protection of the commerce clause of the Federal Constitution depended upon the size of the package, and whether the importer or trader is engaged in wholesale or retail business. This theory is erroneous. It springs from a narrow and literal interpretation of some expressions used in opinions of this Court. *Qui haeret in litera haeret in cortice.* The true and sound doctrine is undoubtedly that the size of the package and whether sold at wholesale or retail is wholly immaterial. The real test is its character as an article of commerce, and not its size or value. If it be an article of lawful commerce and consumption, the smallest package is entitled to freedom of trade untrammeled by taxation or by burdensome and needless regulations.

Certainly it cannot be maintained that the efficacy of the commerce clause ceases as soon as bulk is broken, and that the Constitution protects sales at wholesale but not at retail. If this were so, the guaranty of immunity

[1] See appendix for a reference to the legislation of the various states.

from state interference in interstate commerce would be of little value. Take the instance of dressed beef involved in *Minnesota* v. *Barber*[1] and *Brimmer* v. *Rebman*.[2] A carload of beef is shipped from one state to another, containing a number of carcasses or quarters. Is the protection of the federal guaranty limited to the carload, or carcass, or quarter? Is the importer or his agent limited to sales at wholesale, and can the state then prevent him from selling or another from purchasing at retail? Can it be supposed that the Court intended that the Minnesota statute should be held invalid only so far as it applied to sales of fresh meats in the original packages in which they had been shipped into the state? Has a state power to forbid entirely the sales of fresh meat brought from another state after it has been taken from the refrigerating car, or other original package, and is it only under the protection of the commerce clause while it remains in the car, and merely to that extent? Could the sale of sugar, coffee, tea, or tobacco, imported from abroad, be thus trammeled? If it could, the value of any commodity could be completely destroyed; for, of course, the continuance of the right to sell "is indispensable to its value" even in the hands of the importer or original holder.

The extreme to which courts have gone may be evidenced by the recent decision in the case of *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep., 136, 138, involving the validity of the Minnesota statute, which requires oleomargarine to be artificially colored pink and which act was copied from the New Hampshire statute. The act was

[1] 136 U. S., 313. [2] 138 U. S., 78.

held not to encroach upon the domain of the national government upon the following reasoning:

"It is not invalid as interfering with the exclusive power of congress to regulate commerce among the several states. The act does not interfere with oleomargarine so long as it remains an article of commerce, and is being handled or stored as such. It is only after it has ceased to be an article of commerce, and becomes a part of the mass of the property of the state, and as such is being sold, or kept and exposed for sale, that it comes under this act; which makes no distinction in favor of the article manufactured in this state, or against that which is brought from other states."

The prevalent error as to the meaning and scope of the expression "original package" results from confounding, with cases involving taxation, those which involve the extent and validity of a particular application of the police power. It was held in *Brown* v. *Maryland*[1] when the bulk of an imported article is broken and "has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state," and quite properly so. It then came within the reach of the power of taxation, as any other property. But it was not held, and this Court has never held, that the breaking of bulk deprives the articles of the protection and benefit of the commerce clause. It has never been decided that the commerce clause protects only the dealer at wholesale, and that states are at liberty to prohibit the sale at retail of recognized and legitimate articles of commerce imported from other states, or other countries, so soon as the bulk of the original package is broken.

A study of some of the cases in the lower federal

[1] 12 Wheat., 419.

courts which are said to turn upon the original package doctrine reveals, therefore, a fundamental misconception of the decisions of this Court (*e. g.*, *Armour Packing Co.* v. *Snyder*, 84 Fed. Rep., 136; *Guckenheimer* v. *Sellers*, 81 Fed. Rep., 997). This misconception is that the commerce clause protects only so long as the article remains unbroken in the original package of interstate commerce, and ceases to protect the contents when the package is broken. When this occurs, it is said that the state may exercise its police power over the same article to an extent which it could not do before. In other words, the idea seems to be that the federal power is spent when under its protection the "original package" has been convoyed into the hands of the consignee, who is usually a wholesale dealer, and that, if he breaks bulk, he thereby forfeits the federal protection, and thereafter holds subject to the power of a state to prohibit the sale at retail and to destroy commercial value.

The term "original package" was first employed by this Court in *Brown* v. *Maryland*, 12 Wheat., 419, 441, where Chief-Justice MARSHALL said:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

It is here very clear that there was no intention to make the original package a test of the commercial character of the article. No question of this kind was involved.

The commercial character was admitted, and the question was at what point the prohibition upon the state to tax imports ceased to operate. To tax imports incidentally as a part of the general property of the state from which they are undistinguishable is entirely different from an attempt to tax imports specifically as such, which was the point presented in *Brown* v. *Maryland*. The states cannot tax imports specifically, even though the original packages have been broken.[1] Nor can it be said that there is a difference in respect of foreign commerce, because that was the point involved in *Brown* v. *Maryland*. No state can close to a citizen of another state a market which it must open to the foreigner. As Mr. Justice BRADLEY said in *Crutcher* v. *Kentucky*, 141 U. S., 47, 57:

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

The question as to whether or not an article is a subject of lawful commerce, and the converse question as to whether or not an article is a subject of a lawful exercise of the police power, cannot depend upon its form or casual quantity. An article commercial in its nature, as determined by reference to commercial usage, does not lose this natural character at any time; and any particular article which, according to the same test, is not in its nature commercial, cannot become so by being shipped across the boundary of a state.

In the cases at bar, the original package was never broken, and it is a digression to argue this aspect of the

[1] See *In re May*, 82 Fed. Rep., 422; *Preston* v. *Finley*, 72 Fed. Rep., 850; *Emert* v. *Missouri*, 156 U. S., 296, 313.

question. The discussion, however, bears to some extent upon the views expressed by the Pennsylvania Supreme Court.

III.

The police power of the states in respect of local and interstate commerce.

The exercise of the police power by the state legislatures may come before this Court for adjudication in two aspects: the one with relation to matters wholly of local concern, such as internal traffic and trade, the other with relation to matters of national concern, which can only be regulated by one uniform system, such as commerce among the states. In the one class of cases, the question arises solely under the fourteenth amendment and its requirement of due process of law; in the other class, it arises under the commerce clause of the Constitution which was intended to secure and guarantee freedom of trade and untrammeled commercial intercourse among the several states. This Court has repeatedly recognized that, whatever may be the power of a state over manufacture and commerce that is completely internal, the local legislatures can never regulate or prohibit or interfere with interstate commerce. The one class of legislation may be within the sphere of state action, or what used to be termed state sovereignty; the other class of legislation is an encroachment upon the sphere and domain of the national government.

In *Brennan* v. *Titusville*, 153 U. S., 289, 299, Mr.

Justice BREWER, delivering the unanimous opinion of the Court, said:

"Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the National Government, it cannot be sustained."

Mr. Justice HARLAN has said (*New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650, 661) in discussing the powers of the states and speaking for the whole Court:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, *for any purpose whatever*, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

The general principle is found most clearly stated in the oft-quoted language of Mr. Justice CATRON in the *License Cases*, 5 How., 504, 599, as follows:

"The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. *But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress.* And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the States."

As Mr. Justice MILLER said in *Henderson* v. *Mayor of N. Y.*, 92 U. S., 259, 271:

"This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent

of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In *Railroad Co.* v. *Husen*, 95 U. S., 465, 473, Mr. Justice STRONG used the following language:

"The police power of a State cannot obstruct foreign commerce or inter-state commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

When a state legislature acts within its sphere of local concerns, every reasonable presumption is indulged by this Court in favor of the validity of the enactment; and it is now the settled rule of constitutional exposition that if a state, in enacting any law, may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support the law is presumed. But no such presumption can be indulged when state legislation *prima facie* affects and encroaches upon commerce among the states. Then it must appear clearly and affirmatively that the local regulation is grounded in some fair necessity for the exercise of the police power and is a necessary provision for the protection of the community (Point II). It must be conclusively established, if an article be excluded, that it "no longer belongs to commerce, or, in other words, that it is not a commercial article." The protection or guaranty of the Federal Constitution is *general*, affecting the people of all the states; the police power of the state is *special*, affecting only the people of one state; and consequently,

whenever it appears *prima facie* that the special power encroaches upon the general power, the presumption must be in favor of the latter. Were it otherwise, the result would minimize the value of the federal pledge of freedom of commerce and vastly extend the power of the states. As Mr. Justice MATTHEWS said in *Bowman* v. *Railway Co.*, 125 U. S., 465, 494:

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people."

To quote again from the opinion of Mr. Justice CATRON in the *License Cases*, 5 How., 504, 600:

"Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. * * The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing."

When the state legislature attempts to reach out and

encroach upon matters *prima facie* within the exclusive sphere and domain of the national government, upon the ground that the health or morals or safety of the community demands prohibitive legislation, it is not only a reasonable but a proper and essential safeguard that the state should be required to establish this public necessity. If presumptions are to be indulged, it must be in favor of free and untrammeled commerce. When a state prohibits all traffic in an article of commerce, and thus clogs commercial intercourse among the states, it *prima facie* encroaches upon the domain of the national government, and should be prepared, in every such case, to establish that the commodity it excludes is not a legitimate article of commerce—not merely according to its local or provincial view or prejudice or interest, but according to national views and national needs. This Court must ever finally adjudicate upon the merits of the question thus raised. It will certainly not say, as the Supreme Court of Pennsylvania has said, that the prohibition of interstate commerce is "a question that has been decided for us" by the legislature.

With respect to matters of purely local concern and internal traffic, the question as to what police regulations are appropriate or necessary is confided, in great measure, to the discretion of the state legislatures. In all such cases a presumption is, therefore, indulged in favor of the validity of the statute, and because thereof this Court has established the rule above mentioned—that unless the statute, in its purpose as evidenced by its necessary effect, clearly and palpably violates some fundamental right, it will be sustained. This was plainly the basis of the decision

in *Powell* v. *Pennsylvania*, 127 U. S., 678, 686, for the Court by Mr. Justice HARLAN in that case said:

"The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is *unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food*, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

In that case, no question of interstate commerce was involved. We cannot conceive that such language would ever have been used with relation to a statute unnecessarily oppressive to those engaged in interstate commerce and manufacturing or selling wholesome oleomargarine as an article of food. On the contrary, the Court would say, as enunciated at the last term in *Scott* v. *Donald*, 165 U. S., 58, 91, that no presumption of good faith in the exercise of the state's police power could ever "control the final determination whether the statute, in some of its provisions, is not repugnant to the Constitution of the United States." Conceding that the act is valid as an exercise of the police power in regard to internal affairs, the Court would say, as Mr. Justice Brewer said in *Brennan* v. *Titusville*, 153 U. S., 289, 302:

"We are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained."

The Commonwealth of Pennsylvania wholly failed to introduce any proof tending to establish that oleomargarine was not wholesome, or was so injurious as not properly to belong to commerce or not to constitute a commercial article. If we refer to the records, the fact will be conclusively evinced, that in each of the cases at bar the article for the sale of which, in the original packages of commerce, the plaintiffs in error are prosecuted, is the article of interstate commerce. Moreover, it is a notorious fact within the common knowledge of every one that oleomargarine is a valuable commercial commodity, in use all over the world as an article of food. Certainly, in the absence of proof, no presumption based upon the nature of the article can exist that oleomargarine is injurious in view of the facts above stated under Point II.

If the legislatures of the states could, in the exercise of their police power, finally determine what articles are and what are not lawful subjects of the commerce power, the commerce of the nation would be completely at the mercy of the states.

The language of Grosscup, D. J., in *In re Lebolt*, 77 Fed. Rep. 587, 589, is a very clear discussion of the subject, viz.:

"The constitution of the United States, and the laws of congress in pursuance thereof, and the interpretation of the constitution and laws of congress by the courts of the United States, are the supreme law of the land. The United States, therefore, through its constituted tribunals, is the judge as to whether a given exercise of power upon the part of the state is in reality the exercise of a police power, or is only an attempted restriction or regulation of interstate commerce. It may be one or it may be the other, but the judges of that fact are the authorities of the United States and not the authorities of the state. Therefore, the mere fact that this ordinance, or

any other ordinance or law upon one of these subjects, has been enacted by the authority of the state, is not in itself determinative of its being an exercise of police power. That remains to be determined when the question is raised in a particular case in one of the tribunals of the nation. If that were not the case, the local interests of each State might very seriously affect interstate commerce. A state in which, for instance, the dairy interest predominates, might hold that oleomargarine was unhealthful, and therefore, that its prohibition or its regulation was a matter belonging to the state; whereas, the people of the United States might look upon oleomargarine as a healthful product, and cheaper than the product produced by the dairy interests. On the other hand, in a state where the lard interest predominated, it might look upon the dairy interest as unhealthful to the people. The fact is that there are many doctors now who frighten one every time he eats butter or drinks milk as taking on himself the danger of tuberculosis. So that, if the several regulations were to be left with the local governments, there would be no telling where the power would fall in one case and where it would fall in another. But it is left with the national power in its national tribunals."

IV.

THE PROHIBITION OF THE PENNSYLVANIA STATUTE IS AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

The governmental power of the states, called the "police power," which extends to the uncompensated destruction or impairment of property, finds its origin and sole justification in the principle that every person ought to so use his property as not to injure his neighbors, and in the principle correlative to this—that private interests must be made subservient to the general welfare of the community. Otherwise stated, the police power is founded upon and alone justified by public necessity, and has, therefore, been styled "the law of overruling necessity." Public necessity, in the sense of that which sup-

plies the reason of the police power, is exactly coextensive with the protection of the public against the wrongful acts of its individual members. In such cases, the exercise of the power is in immediate connection with the protection of persons and property against injurious acts of other persons, and is essentially self-defensive. The acts of protection are sanctioned and supported by the great principle of securing the public safety.

In the cases at bar, we are not concerned with police laws which, enacted to promote the general peace and order of society, operate equally upon all property and all persons. The inquiry must be directed to ascertaining the necessity which is to support the validity of a special act, an act which singles out for the purpose of destruction a particular class of property or the property of a particular class of persons. "But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress."[1] Such an act is in its nature exceptional, and, if it be not sustained by a necessity reasonably commensurate with evils which the public would otherwise suffer, it is an act without reason—an exercise of power merely and not of right. As was said in the opinion of this Court, by Mr. Justice MILLER, in *Chy Lung* v. *Freeman*, 92 U. S., 275, 280:

"Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity."

And in *Mugler* v. *Kansas*, 123 U. S., 623, 661, Mr. Justice HARLAN used the following language so often quoted:

"If, therefore, a statute purporting to have been enacted to protect

[1] *License Cases*, 5 How., 504, 600.

the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The statute of Pennsylvania declares that the sale of oleomargarine within its borders shall be a criminal offense. It is not an inspection law. The prohibition of sale or keeping for sale is absolute, and does not depend upon the purity or impurity of the articles. As the court below frankly admitted—"Our statute is directed especially against the sale of oleomargarine as an article of food" (Paul record, No. 88, p. 18). One class of property is thus singled out from other property to be destroyed; and one class of business men is thus singled out from others, to be prosecuted as criminals if they attempt to carry on a legitimate trade in interstate commerce.

The Pennsylvania statute forbids the sale of oleomargarine in any form, even if free from any coloration or ingredient that causes it to look like butter. In each of the cases at bar arising thereunder, the jury by special verdict found that "all the provisions of the act of Congress of August 2, 1886," had been complied with, and that "the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter, or any understanding on the part of the purchaser that he was buying anything but oleomargarine."

In *Railroad Co.* v. *Husen* 95 U. S., 465, 472, Mr. Justice STRONG said:

"While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and *reasonable* inspection laws, *it may not interfere* with transportation into or through the State, *beyond what is absolutely necessary for its self-protection.* It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce."

In *Minnesota* v. *Barber*, 136 U. S., 313, 320, Mr. Justice HARLAN said:

"Underlying the entire argument in behalf of the State is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. * * It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

The case of *Powell* v. *Pennsylvania*, 127 U. S., 678, 684, (decided in April, 1888) is distinguished from the cases at bar not only upon the ground that it had relation solely to internal trade and traffic, but also for the reason that the basis of the decision was the assumption of fact "under the

circumstances disclosed in the record" that "most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health." There is no proof whatever of this fact in the cases at bar, and the progress in science and manufacture has made it impossible that any such fact should be true at the present time. Moreover, the act of Congress has made it the duty of government officials to prevent deleterious ingredients (c. 840, sec. 14, 24 Stat. 212), and it is proper to assume that the product of manufacturers and dealers licensed by the national government are free from such ingredients.

The necessary and natural operation of the Pennsylvania act is an unreasonable discrimination between two legitimate food products—the exclusion of one (oleomargarine) from the markets of the state, and a consequent destruction or impairment of its value, to the end that the other (butter) may advance in value, by virtue of the monopoly thus granted, far beyond the price which would follow honest competition. Suppose by way of illustration, that a State whose soil was adapted to the growth of wheat but not of corn should, in order to protect its wheat growers, enact that because corn is largely used in the manufacture of bogus and adulterated sugar, the sale of corn as an article of food be prohibited; or that Vermont, in order to protect its maple sugar crop, should prohibit the sale of all sorghum sugar; or that Pennsylvania should prohibit the sale of bran flour because it is used to adulterate mustard; or that West Virginia should prohibit the sale of all anthracite coal "designed to take the place of bituminous coal as an article of fuel"; or that Louisiana should prohibit the use of

beet sugar or glucose or saccharine because these may be used as substitutes for the local product of cane sugar: could it be supposed for a moment that such prohibitions would be upheld in so far as they related to the sale of articles of interstate commerce?

The police power of a state can, of course, be exerted to prevent deception and fraud; but the utmost extent to which deception may reach in some cases can never justify the prohibition of an article not at all deceptive. This act prohibits sales of an article not calculated or intended to deceive, not colored in imitation of butter, manufactured under precautions and methods which now insure its wholesomeness, under the supervision of federal officers whose duty it is to prevent deleterious ingredients, and sold under regulations which absolutely preclude the idea of deception in the sale. If anyone is deceived by oleomargarine in its natural form into eating it for butter, neither the manufacturer nor the dealer, wholesale or retail, is at fault. No fraud has been perpetrated and no injury has been done. The ordinary person will have knowledge, as of notorious facts, that oleomargarine is wholesome and nutritious, and is designed to take the place of butter because in its natural form it is a legitimate and desirable substitute for butter in the opinion of those who cannot afford the more expensive article; that it is used as such all over the world and is an important subject of traffic and interstate and foreign commerce, and that the federal government derives a large annual revenue from the taxation of this article, the regulation of its manufacture and the licensing of those engaged in the business.

If any person having such knowledge—and every person is charged with it—prefers butter to oleomargarine, he should be at liberty to make the choice; and, if he is too poor to buy good butter, he should be at liberty to procure at low prices a wholesome and palatable substitute. Can it, therefore, be said that, in order to protect the dairy interests of a state, the right of preference may be denied to those who prefer oleomargarine or who are too poor to buy butter; that, in order to promote a virtual monopoly in an article of food, the property of those who would encroach upon that monopoly by selling a cheaper substitute may be destroyed; and that, in order to protect the business and products of one state, the business and products of another state may be excluded?

It is submitted that, under the American form of government and constitutional rights of individual liberty, no person can be denied the privilege of manufacturing a legitimate article of trade or food and honestly selling it in another state for what it really is, without fraud or deception.

V.

THE STATUTE OF NEW HAMPSHIRE IS LIKEWISE AN UNCONSTITUTIONAL INTERFERENCE WITH INTERSTATE COMMERCE.

The statute of New Hampshire forbids the sale of oleomargarine within the boundaries of the state "unless it is of a pink color." It cannot be claimed that the purpose of the statute was to protect the health of the public, because sales of the article are freely allowed if it has been colored pink, thus conclusively establishing

that the legislature did not consider or pretend to declare that the article was unwholesome. As the State of New Hampshire has indisputably recognized oleomargarine as an article of consumption and commerce, the question is, therefore: Can a state legislature constitutionally impose upon trade and traffic in an article of interstate commerce any such unreasonable and arbitrary regulation as that it shall be artificially colored pink or blue or green or black or any other unnatural and unpleasant color? The act requires oleomargarine to be pink, not in order to enable purchasers to distinguish it from butter, but in order to make it so unpleasant and unattractive as an article of food as to practically prohibit its sale. To repeat the language of Mr. Justice SHIRAS in *Scott* v. *Donald*, 165 U. S., 58, 91:

"So long, however, as state legislation continues to recognize wines, beer and spirituous liquors [oleomargarine] as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles."

It must be apparent that the natural and necessary purpose and effect of this statute of New Hampshire is the entire prohibition of the sale and use of oleomargarine in its natural form, not colored in imitation of butter or otherwise calculated to injure, deceive or defraud any person. The act is not a quarantine or inspection law. It does not fix a standard of purity or purport to prohibit the use of dangerous or unwholesome food. The deliberate and obvious intention was to render oleomargarine unpleasant and disagreeable.

If such legislation is to be sustained, similar regula-

tions will be aimed at beet sugar, at lard made from cottonseed oil, at oil for salad dressing, at glucose, &c., &c. It must be ridiculously evident that if beet sugar had to be colored pink or green or chocolate or black its market value would be destroyed. So, too, of salad oil, lard, &c.

As has been pointed out in the foregoing argument, the primary inquiry, the decisive fundamental test is whether the commodity is a recognized and legitimate article of commerce. We may repeat that, as the state permits the free sale of oleomargarine if artificially colored, it thereby conclusively recognizes its character as an article of commerce. The Supreme Court of New Hampshire, moreover, has recognized that oleomargarine was a legitimate article of commerce, properly and exclusively within the domain of Congress and of the federal judiciary. The fact was found that "the oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food" (p. 7). Even upon the point of *color*, the court below conceded that this was a federal question within "the need of a uniform operation of federal law," and, therefore, entered judgment against Collins in order to "furnish an opportunity to carry the federal question to the only tribunal by which that question can be settled," namely, the question as to the regulation of color. This statement of Doe, C. J., clearly shows that the Supreme Court of New Hampshire interpreted the requirement as to coloring to be a matter not only affecting interstate commerce but constituting a local regulation of what should be national and determined by the national judiciary. If the court had concluded, or could

have concluded, that the inhabitants of New Hampshire were in need of particular protection on this point of color in order to prevent deception and fraud, it would have so held; but it could not sustain the act on any such pretense.

According to the *Plumley* case, oleomargarine does not resemble butter unless artificially colored. In the *Collins* case at bar there was no proof of artificial coloration whatever. There is no evidence in the case that oleomargarine in its natural form resembles butter, and every one knows that it does not. The Court will not presume such a resemblance, particularly in the face of the legislation of most of the states, which proceeds upon the theory, based on fact, that oleomargarine must be artificially colored in order to make it resemble butter. Indeed, the Court may properly take judicial notice of the fact that oleomargarine in its natural condition is white and does not resemble butter unless artificially colored. Nor was there any evidence of an intention to deceive any person, and such an intention could not be presumed. On the contrary, the jury found that all the provisions of the law had been complied with "except the color of its contents was not pink." These provisions were that upon each package should appear in plain Roman letters not less than one-half inch in length, the word "Oleomargarine," and "so placed and made or attached that they can be readily seen and read and cannot be easily defaced;" and "when any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as

above in like letters." The undisputed compliance with these provisions as well as with the requirements of the act of Congress eliminated any suspicion or pretense of deception and fraud in the sale of oleomargarine, and has, therefore, removed that question from this case.

The distinction between this New Hampshire statute and those which prohibit sales of oleomargarine or other articles colored to represent an article which they are not, is plainly marked. In all those cases it is presumed that such acts of imitation, which it is assumed serve no useful purpose and add nothing to the intrinsic value or merit of the article, are done with intention to deceive and defraud.

Such was the case of *Plumley* v. *Massachusetts*, 155 U. S., 461, 467, 478, where the statute of Massachusetts which prohibited the sale of oleomargarine "artificially colored so as to cause it to look like genuine butter," was upheld as a valid exertion of the police power. Mr. Justice HARLAN there said:

"It appears, in this case, that oleomargarine, in its natural condition, is of 'a light-yellowish color,' and that the article sold by the accused was artificially colored 'in imitation of yellow butter.' Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform

the customer of its real character. He is only forbidden to practise in such matters a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. * * We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy."

No argument is required to show that the New Hampshire statute presents an entirely different question from that involved in the *Plumley* case. It is not a measure compelling "the sale of oleomargarine for what it really is by preventing its sale for what it is not," but a measure to compel the sale of oleomargarine in what is not its natural color. The question here is not whether it is within the power of a state to "exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use," but whether this power extends to the exclusion of an article of food in general use unless it be artificially colored so as to render it unpleasant to the sight and to practically destroy its commercial value as an article of food. The legislature might, with equal propriety, have directed the addition of an offensive flavor or odor, or have required that it should be labeled "Poison." Is it, then, to be permitted, in dealing with an article of commerce so universally dealt in as oleomargarine, that one state may forbid its artificial coloration and another compel it; that one state can prevent its coloration and other states require particular colors

according to local prejudice, such as pink, green, purple or black?

The question involved in *Plumley* v. *Massachusetts* arose in *People* v. *Arensberg*, 105 N. Y., 123, 129, where the same principle prevailed and the same conclusion was reached upon the same general ground. The Court of Appeals of New York, by RAPALLO, J., said:

"They may legally be required to sell it for and as what it actually is, and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to *artificial* means to make it resemble dairy butter in appearance."

This principle, it will be observed, also controlled the decision in *People* v. *Girard*, 145 N. Y., 105, 109, 110, where the same court upheld a statute prohibiting the manufacture and sale of vinegar containing any preparation injurious to health or any coloring matter, and by FINCH, J., said:

"There is talk here of interference with the vested rights of the individual. Sometimes it is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true and natural appearance; in plain words, a vested right to deceive the public. * * *The present law does not in the least interfere with the honest manufacture and sale of the distilled vinegar.*"

Undoubtedly, much of the prejudice against oleomargarine in the past may have been due to fraudulent practices and deception. But no necessity for exertion of the police power arising from evils thus occurring can ever justify a destruction of the property of honest manufacturers who may compete with the butter industry by selling oleomargarine for exactly what it is, with no intent to deceive any person and under circumstances

which can in no degree warrant an imputation of an intention to defraud. The plaintiff in error, Collins, is by the record shown to belong to the latter class.

The statute now attacked prohibits all trade in oleomargarine unless artificially colored pink, a restriction which is clearly unreasonable and arbitrary. It would be unreasonable and an abuse of power to prohibit sales of butter unless an unpleasant or loathsome odor or flavor or color be artificially imparted to it. The natural and necessary effect in each of these cases would be the same: a practical prohibition of sales and a consequent destruction of this class of property. What would be said if, in a state where the dairy interests were not dominant, a statute should be passed requiring butter to be artifically colored pink or green or purple upon the pretense that it competed with oleomargarine, a local industry, which the majority of the legislature thought should be encouraged as the poor man's food!

And yet such preposterous legislation would present the identical constitutional question now submitted for adjudication.

This statute which requires oleomargarine to be artificially colored pink is an interference with interstate commerce which should not be tolerated, for the principle could be extended to innumerable commodities. If fraud in the sale of oleomargarine is so extensive as to require any such extreme measure, the regulation should come from Congress and thus be uniform throughout the states. An unconstitutional and dangerous doctrine will secure a footing if this local regulation and restriction of commerce be sanctioned. The only safe rule of conduct must be

that the states cannot interfere in this manner with commercial intercourse and regulate commerce and that Congress alone has the power. As Mr. Justice BREWER said in *Brennan* v. *Titusville*, 153 U. S., 289, 302:

"The silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

CONCLUSION.

It is, therefore, submitted that the so-called oleomargarine acts of New Hampshire and Pennsylvania should be declared unconstitutional in so far as they affect interstate commerce, because they conflict with the exclusive power of Congress to regulate commerce among the states, and because they deny that freedom of commercial intercourse which it was the purpose of the framers of the Federal Constitution, above all other considerations, to secure to the people of the United States.

Washington, March 7, 1898.

WILLIAM D. GUTHRIE,
RICHARD C. DALE,
HENRY R. EDMUNDS,
ALBERT H. VEEDER,
Of counsel for plaintiffs in error.

APPENDIX.

STATE STATUTES SHOWING THAT OLEOMARGARINE IS UNIVERSALLY RECOGNIZED AS A LEGITIMATE ARTICLE OF FOOD AND, AS SUCH, A LAWFUL SUBJECT OF INTERSTATE COMMERCE.

Proviso of the Massachusetts statute, which statute was under consideration in the *Plumley* case:

"*Provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." Mass. Stats. 1891, ch. 58, p. 695.

This proviso is retained in the latest act (Stat. 1894, ch. 280, p. 1009).

It has been, in substance, incorporated in the law of seventeen other states:

Alabama, Acts, 1894-5, No. 408, p. 777. *California*, Penal Code, 1897, p. 516. *Colorado*, Laws, 1895, ch. 19, p. 57. *Connecticut*, Pub. Laws, 1893, ch. 114, p. 264. *Delaware*, Laws, 1895, ch. 209, p. 274. *Georgia*, Laws, 1895, pt. 1, tit. 7, p. 67. *Michigan*, Pub. Acts, 1897, Act 76, p. 83. *Missouri*, Laws, 1895, p. 26. *Nebraska*, Comp. Stats., 1895, pp. 1355–1357. *New Hampshire*, Laws, 1895, ch. 115, p. 477. *New Jersey*, Laws, 1895, ch. 332, p. 658. *Ohio*, Rev. Stat., 1897, vol. 2, tit. 5, ch. A, p. 2230. *South Carolina*, Laws, 1896, No. 96, p. 215. *Tennessee*, Anno. Code, 1896, ch. 16, p. 793. *Utah*, Rev. Stat., 1898, tit. 15, p. 242. *Washington*, Anno. Code, 1897, vol. 1, ch. 2, sec. 2846. *Wisconsin*, Laws, 1895, ch. 30, p. 77.

Seventeen other states provide for labeling, forbid arti-

ficial coloring, and the like, and otherwise allow unrestricted manufacture and sale:

Arkansas, Dig. of Stats., 1894, ch. 48, p. 522. *Florida*, Rev. Stat., 1891, ch. 8, p. 831. *Idaho*, Rev. Stat., 1887, tit. 9, sec. 6917, p. 744. *Illinois*, Laws, 1897, p. 151. *Indiana*, Rev. Stat., 1897, sec. 2191, p. 351. *Iowa*, Anno. Code, 1897, secs. 2516-2518, p. 880. *Kentucky*, Laws, 1893, ch. 182, p. 794. *Louisiana*, Rev. Laws, 1897, p. 752. *Mississippi*, Anno. Code, 1892, sec. 1242, p. 365. *Montana*, Stats., 1895, tit. 10, p. 1078. *Nevada*, Gen. Stat., 1885, sec. 4810, p. 1069. *New York*, Rev. Stats., 1896, p. 40. *North Carolina*, Pub. Laws, 1895, ch. 106, p. 105. *North Dakota*, Laws, 1895, ch. 49, p. 61. *Oregon*, Anno. Laws, 1892, ch. 36, p. 1468; Laws, 1893, p. 102. *Rhode Island*, Gen. Laws, 1896, ch. 146, p. 451. *Texas*, Rev. Stat., 1895, Penal Code, tit. 12, ch. 2.

In four states sales are forbidden unless the article has been artifically colored pink:

Minnesota, Gen. Laws, 1891, ch. 11, p. 83. *South Dakota*, Sess. Laws, 1897, ch. 65, p. 183. *Vermont*, Stats., 1894, secs. 4334-4336, Laws, 1890, No. 53, p. 63. *West Virginia*, Code, 1891, p. 1046, Acts, 1891, ch. 8, p. 12.

Nos. 17, 86, 84 & 88.

Reply Brf. of Guthrie, Dale & Veeder for

OLEOMARGARINE CASES.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Mar. 23, 1898.

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REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

The brief on behalf of the Commonwealth of Pennsylvania suggests a more critical discussion of two points, viz.:

(I) As to the effect of the special findings of fact by the jury and the decision of the supreme court of Pennsylvania upon the question of the commercial character of oleomargarine.

(II) As to the rule of presumption in regard to any state statute which attempts to regulate or interfere with interstate commerce in an article of recognized commercial character.

It may be proper to mention that the right, privilege and immunity under the Federal Constitution was in each case specially set up and claimed by the plaintiffs in error (record in No. 17, p. 4; in No. 86, p. 12; in No. 87, p. 11, and in No. 88, pp. 12, 17.) Under the practice in Pennsylvania, the proper plea was "not guilty." The jury then found all the facts necessary to bring the case under the commerce clause, and the decision was in favor of the defendant. As the Commonwealth appealed, there was no assignment of errors showing the federal question. It was, however, the only point discussed on the argument, and the only question decided. This fully appears from the opinion of Williams, J., in No. 88 (p. 17.) As such opinion is made a part of the record under the local law (Laws of Pennsylvania 1871, p. 266), it fully complies with the requirement under the practice of this Court and Section 709 of the Revised Statutes of the United States (*Gross* v. *United States Mortgage Company*, 108 U. S., 477, 486; *Adams County* v. *Burlington & Missouri R. R. Co.*, 112 U. S., 123, 129; *Phila. Fire Association* v. *New York*, 119 U. S., 110, 116; *Kreiger* v. *Shelby R. R. Co.*, 125 U. S., 39, 44; *Dale Tile Manufacturing Co.* v. *Hyatt*, 125 U. S., 46, 53; *Walter A. Wood Co.* v. *Skinner*, 139 U. S., 293, 295; *United States* v. *Taylor*, 147 U. S., 695, 700; *Egan* v. *Hart*, 165 U. S., 188, 189; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S., 451, 456).

I.

As to the effect of the special findings of fact by the jury and the decision of the Supreme Court of Pennsylvania upon the question of the commercial character of oleomargarine.

The rule is well established that the findings of fact by the trial court or jury as well as by the supreme court of the state are absolutely binding upon this Court; and that whatever has been so found or is properly to be implied therefrom must be deemed beyond the power of the Court to re-examine (*Hedrick* v. *Atchison, Topeka etc. Railroad*, 167 U. S., 673, 677; *Dower* v. *Richards*, 151 U. S., 658, 668). This rule is so well established that even if the Court were of opinion, in view of the evidence, that the jury had clearly erred in finding any particular fact, the question would not be examined here (*Chicago, Burlington, &c., R'd* v. *Chicago*, 166 U. S., 226, 246)

The special findings of the jury are substantially the same in all of the cases at bar. For the purposes of the argument we shall take the *J. Otis Paul* case (No. 88), because that is the only case in which any extended discussion by the court below will be found (record, pp. 2–13; 170 Pa. St., 284, 286). The jury found, as stated in the original brief, that Braun & Fitts were engaged in business at Chicago in the manufacture of oleomargarine; that they had been duly licensed under and had complied with all the provisions of the act of Congress; and that they had shipped the package in question from Chicago to their agent, a wholesale dealer in Pennsylvania, which package, unbroken, and with the original

marks, brands and wrappers, was offered for sale. The jury then found, as follows (record, p. 13):

> "On or before the said second day of October, 1893, the said Braun & Fitts shipped to the said defendant, their agent as aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing ten pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package as required by said act, and was of such form, size and weight as is used by producers or shippers for the purpose of securing both convenience and handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, *and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania.* * *
>
> "The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, * * *and the said oleomargarine is recognized by the said act of Congress of August 2nd, 1886, as an article of commerce.*"

The Court must presume that there was evidence to sustain the finding, and that this question, whether the oleomargarine sold was the oleomargarine recognized by Congress, was duly litigated and found in favor of the plaintiffs in error. (*Grand Trunk Railway Co.* v. *Ives*, 144 U. S., 408, 416.)

The supreme court of Pennsylvania did not question the fact that oleomargarine was an article of interstate commerce. On the contrary, the court in its opinion distinctly recognized that it was an article of interstate commerce. Thus Williams, J., said (record, p. 18):

> "Our statute is directed especially against the sale of oleomargarine as an article of food, * * and, *unless*

> *these goods are in such original packages as the laws of the United States must protect*, the sale is clearly punishable under our statute."

This must be taken in connection with the decision of the same court in *Commonwealth* v. *Schollenberger*, 156 Pa. St., 201, 210, where the court conceded that oleomargarine was a legitimate article of interstate commerce, viz.:

> "We do not deny that a nonresident manufacturer may sell his goods and ship them to a buyer in the usual trade packages employed in good faith by manufacturers, without being amenable to the police laws of this state therefor. He may bring them here and hold them in bulk without danger. So much is fairly ruled in *Leisey* v. *Hardin*. He may sell them to the trade or for shipment to the states in the same unbroken trade packages notwithstanding their unlawful character. This clearly results from the rule in *Leisey* v. *Hardin*."

Thereupon, to meet the opinion, the cases at bar were tried, in which it appeared that the plaintiffs in error were trying to sell oleomargarine "in the same unbroken trade packages"—a tub of forty pounds in one case, and tubs of ten pounds each in the other cases. The issue on the original package and the character of the contents was sharply raised; but the court, notwithstanding the finding of the jury, held that the act of 1885 prevented sales within the state even in the original packages of commerce. The following sentence will show the theory and ground of the decision (record, p. 20):

> "But we also said that where the size of the package was adapted for the retail trade, so that 'breaking of bulk' was not necessary to 'reduce the goods into the common mass' and fit them for the retail trade, the traffic so conducted was not interstate, but infra-state, commerce; or, in other words, the common every-day retail traffic of the community in which the store was located."

The whole doctrine of the decision in these Pennsylvania cases is, therefore, that although oleomargarine is a legitimate article of interstate commerce and interstate trade therein cannot be prevented, the state may, nevertheless, prohibit sales within the state. In other words, the ruling was that the protection of the commerce clause depends upon the size of the package and whether or not it is adapted to the retail trade.

It is not at all necessary for the plaintiffs in error to contest the proposition that packages may be so prepared as not to be *bona fide* original packages and so as to constitute a trick or evasion of a local statute. It is very doubtful, however, whether motive can ever enter at all into the consideration of a question as to the exercise of a constitutional right. In the cases at bar, the jury have expressly found, after conflicting evidence upon the point, that "the said form, size and weight were adopted in good faith and not for the purpose of evading the laws of the Commonwealth of Pennsylvania."

II.

AS TO THE RULE OF PRESUMPTION IN REGARD TO ANY STATE STATUTE WHICH INTERFERES WITH INTERSTATE COMMERCE IN AN ARTICLE OF RECOGNIZED COMMERCIAL CHARACTER.

Whenever a state attempts to deny the right of interstate commerce, and the commodity prohibited is, as oleomargarine, a proper and recognized article of commerce, the statute is presumptively void. It is *prima facie* in conflict with the Federal Constitution. It is not correct to say that the state is never called upon to prove facts necessary to sustain any particular exercise of the police

power. On the contrary, it must do so in many cases in order to uphold the exclusion of articles of commerce.

Thus, as the Court will recall, in *Railroad Co.* v. *Husen*, 95 U. S., 465, 470, a law of Missouri was held to be unconstitutional because an unauthorized interference with interstate commerce, and subsequently, in the case of *Kimmish* v. *Ball*, 129 U. S., 217, 221, a statute of Iowa upon the same subject but containing different provisions was sustained as constitutional. In the *Kimmish* case, Mr. Justice FIELD, delivering the unanimous opinion of the Court, discussed the *Husen* case and referred to the fact that the state in the *Husen* case had failed to introduce evidence to support the prohibitive measure. The language of the opinion was as follows:

> "No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. HAD SUCH PROOF BEEN GIVEN, A DIFFERENT QUESTION WOULD HAVE BEEN PRESENTED FOR THE CONSIDERATION OF THE COURT."

In the Missouri, Kansas and Texas Railroad case, just decided, Mr. Justice HARLAN emphasized the fact that the Kansas statute did not exclude all cattle. The Pennsylvania statute prohibits dealings in *all* oleomargarine irrespective of purity or impurity.

In the cases at bar, the defendant's brief, notwithstanding the finding of the jury, comments upon the absence of proof as to whether the oleomargarine was wholesome or unwholesome in the following language (p. 13):

> "The prosecuting attorney of the Commonwealth did dispute such character, and relied upon what was conclusive as to the fact; viz., the conclusive determination by the legislature of its unwholesome character."

In *Minnesota* v. *Barber*, 136 U. S., 313, 319, 320, the rule of presumptions was strenuously urged upon the Court, but Mr. Justice HARLAN, delivering the unanimous opinion of the Court, said:

> "The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. * *
>
> Underlying the entire argument in behalf of the State is the proposition, that it is impossible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 42; *Phillips* v. *Detroit*, 111 U. S. 604, 606. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease

> in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease."

To the same effect, on this question of presumption, was *Brimmer* v. *Rebman*, 138 U. S., 78, 83, where Mr. Justice HARLAN, again delivering the unanimous opinion of the Court, said:

> "It is suggested that this statute can be sustained by presuming—as, it is said, we should do when considering the validity of a legislative enactment—that beef, veal or mutton will or may become unwholesome, 'if transported one hundred miles or more from the place at which it was slaughtered,' before being offered for sale. If that presumption could be indulged, consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States."

It was contended in the *Brimmer* case, just as it may be argued here, that the Court should indulge in every

possible presumption, reasonable or unreasonable, supported by or in conflict with notorious facts, in order to sustain the state statute. The Court was asked then, as it may be asked now, to presume that meat might be unhealthy if transported one hundred miles; and many, indeed, so believed at the time the industry of shipping dressed beef was first established. But the Court refused to indulge in any such presumption.

The State of Pennsylvania takes the extreme position that the determination of the legislature is conclusive upon the whole question; namely, "the soundness or unsoundness of the legislative judgment is not supervisable in any court." If that be the law, this Court has been astray on the question for very many years.

It is further urged, on behalf of the State of Pennsylvania, that the state has the right to prevent trade in oleomargarine because oleomargarine may be manufactured with deleterious ingredients which are difficult to discover, and that other states may not take sufficient precautions to insure the manufacture of a wholesome article. The conclusive answer to this suggestion is that Congress has legislated upon this very subject, and has provided under the act of Congress of 1886 a complete system to prevent the use of deleterious ingredients. Even if there were no such federal statute, the answer is to be found in *Barber* v. *Minnesota*, where Mr. Justice HARLAN said (136 U. S., 313, 322):

> "It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute

> had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

So also in *Crutcher* v. *Kentucky*, 141 U. S. 47, 57, Mr. Justice BRADLEY said:

> "Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety."

The importance of the language last quoted will be at once seen when we recall that the act of Congress specifically provides for the prevention of deleterious ingredients, and, for all that appears, both in Illinois and Rhode Island the federal and state officials exercise due supervision over the manufacture of oleomargarine. Indeed, in the Report of the Secretary of the Treasury for 1887, p. 377, one of the

government officials reported as follows, in regard to manufacture at Chicago:

> "I find upon careful investigation that the materials used in this district in the manufacture of oleomargarine consist of the very best-selected fats fresh from the slaughtered animal, and, as a rule, not to exceed a day old, and that the methods employed in the manipulation of these fats are cleanly in the highest degree.
>
> "The factories themselves are as clean and sweet as the abundant use of hot and cold water, soap, and scrubbing brushes can possibly keep them.
>
> "I can not ascertain that there is anything used in this district in the manufacture of oleomargarine that can possibly be construed as being deleterious to the public health, either in themselves or in the manipulation; and from the reports of deputies from time to time, I am satisfied that I am correct in saying that there are no articles used in the manufacture of oleomargarine in this district deleterious to the public health."

After setting forth the reports of his subordinates, the Commissioner of Internal Revenue reported to Congress his opinion as follows (p. 378):

> "The foregoing uniformly favorable testimony of sworn United States officers, whose positions guard them from bias towards either the manufacturing interest on the one hand or the dairy interest on the other hand, and the entire absence of complaint under Section 14 of the law, leads this office to conclude that the manufacturers of oleomargarine, upon whose products the internal-revenue stamps and brands appear, are earnestly endeavoring to render their products not deleterious to the public health."

Moreover, even if the Court were of opinion that oleomargarine was unhealthy or indigestible, the rule would not be changed in any degree. Thus, in *Leisy* v. *Hardin*, 135 U. S., 100, 125, Mr. Chief Justice FULLER said:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

In view of the opinion of the court below, and the extreme ground taken in the defendant's brief as to the alleged conclusive character and binding effect of the declaration of the legislature, the following language of Mr. Justice BROWN in *Lawton* v. *Steele*, 152 U. S. 133, 137, may be instructive, viz.:

> "To justify the State in thus interposing its authority in behalf of the public, *it must appear*, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.*"

See, also, *Bowman* v. *Chicago, &c., Railway Co.*, 125 U. S., 465, 483.

In *Covington etc. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 595, great stress was laid by the state upon "the established rule forbidding the annulment of a legislative enactment not clearly and palpably unconstitutional;"

but Mr. Justice HARLAN, delivering the unanimous opinion of the Court, said that "it made a *prima facie* case of the invalidity of that statute;" thus showing that a statute may be *prima facie* unconstitutional. In the cases at bar, the plaintiffs in error contend that when a state statute prohibits interstate commerce in an article of recognized commercial character the act is *prima facie* invalid, and that it is for the state to establish that the article is as matter of fact injurious to life or health in order to justify and uphold the exclusion.

And in the Nebraska Maximum Rate cases decided this month (*Smyth* v. *Ames*), Mr. Justice HARLAN, answering the plea that the legislature had plenary power, used language which may well be applied here to the doctrine of the Pennsylvania court that the legislature may declare any article injurious if it sees fit to do so and to many passages in the defendant's brief, viz.:

> "But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. *Art. VI.* The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institu-

> tions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

Conclusion.

For these reasons and the argument set forth in the principal brief, the judgments should be reversed and the statutes in question held to be repugnant to the commerce clause of the Constitution of the United States.

Washington, March 22, 1898.

William D. Guthrie,
Richard C. Dale,
Henry R. Edmunds,
Albert H. Veeder,
Of counsel for plaintiffs in error.